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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1986

NATIONAL COMMUNICATION SYSTEMS, INC., A Michigan Corporation; VICTOR E. SHAPLEY,

Petitioners,

versus

MICHIGAN PUBLIC SERVICE COMMISSION, A Commission of the State of Michigan; ERIC J. SCHNEIDEWIND; DANIEL DEMLOW; ROBERT FISCHER and GERALD IRWIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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QUESTIONS PRESENTED

I.

ARE THIS COURT'S DECISIONS IN *PARRATT* v. *TAYLOR*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), AND *HUDSON* v. *PALMER*, 468 U.S. __, 104 S.Ct. __, 82 L.Ed.2d 383 (1984), HOLDING THAT A RANDOM AND UNAUTHORIZED NEGLIGENT OR INTENTIONAL DEPRIVATION OF PROPERTY BY A STATE EMPLOYEE DOES NOT CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IF A MEANINGFUL STATE POSTDEPRIVATION REMEDY FOR THE LOSS IS AVAILABLE, APPLICABLE WHEN STATE EMPLOYEES CONSPIRE OVER AN EXTENDED PERIOD OF TIME WITH THE INTENT TO MALICIOUSLY ABUSE THEIR GOVERNMENT POWER FOR THE PURPOSE OF DESTROYING AN INDIVIDUAL'S PROPERTY?

II.

DOES THE *PARRATT/HUDSON* RULE APPLY TO CONSPIRATORIAL, AS OPPOSED TO RANDOM AND UNAUTHORIZED ACTS OF MISCONDUCT BY GOVERNMENT OFFICERS AND EMPLOYEES, WHERE THE WRONGDOERS THEMSELVES ARE IN A POSITION TO AFFORD THE VICTIM OF THEIR CONSPIRACY DUE PROCESS OF LAW?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE COURT OF APPEALS ERRED IN DISMISSING APPELLANTS' DUE PROCESS CLAIMS AGAINST APPELLEES ON THE GROUND THAT THESE CLAIMS WERE BARRED BY *PARRATT* v. *TAYLOR*, *HUDSON* v. *PALMER*, AND *VICORY* v. *WALTON*.	7
A. The *Parratt/Hudson/Vicory* Rule Does Not Apply To Those Due Process Violations/ Deprivations Which Rise To The Level Of "Constitutional Torts."	7
B. The *Parratt/Hudson* Rule Does Not Apply To Conspiratorial, As Opposed To Random And Unauthorized Acts Of Misconduct By Government Officers And Employees, Where The Wrongdoers Themselves Are In A Position To Afford The Victim Of Their Conspiracy Due Process Of Law.	13
CONCLUSION	17

Page

APPENDIX TO PETITION FOR CERTIORARI:

Appendix A – Opinion – United States Court of Appeals for the Sixth Circuit A-1

Appendix B – Order Granting Defendants' Motion to Dismiss, and Judgment – United States District Court for the Eastern District of Michigan, Northern Division B-1

Appendix C – Complaint – United States District Court for the Eastern District of Michigan, Northern Division C-1

TABLE OF AUTHORITIES

Page

CASES:

Augustine v. *Doe*, 740 F.2d 322 (5th Cir., 1984) 14-15

Baker v. *McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) 12

Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943) 5

Daniels v. *Williams*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 622 (1986) 8, 9, 10

Davidson v. *Cannon*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 677 (1986) 8, 9, 10

Delahoussaye v. *Seale*, 605 F.Supp. 1525 (W.D. Louisiana, 1985) 11

Hudson v. *Palmer*, 468 U.S. __, 104 S.Ct. __, 82 L.Ed.2d 393 (1984) . . . . . i, 7, 8, 12, 13

Hughes v. *Roe*, 449 U.S. 5 (1980) 10

Parratt v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1980, 68 L.Ed.2d 420 (1981) . . . . . i, 7, 9, 13, 14

Rochin v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 113 (1952) 7

Rymer v. *Douglas County*, 764 F.2d 796 (11th Cir., 1985) 10, 11

Vasquez v. *City of Hamtramck*, 757 F.2d 771 (6th Cir., 1985) 11, 12

Vicory v. *Walton*, 721 F.2d 1062 (6th Cir., 1983) . . 7

Wilson v. *Beebe*, 743 F.2d 342 (6th Cir., 1984) . . . 11

STATUTES:

42 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 . . . . . 2, 4, 7, 8

Page

UNITED STATES CONSTITUTION:

Fourteenth Amendment 2

MISCELLANEOUS:

MCR 3.306 16

Michigan Administrative Code (1979), Rule R 460.31 15

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NATIONAL COMMUNICATION SYSTEMS, INC., A Michigan Corporation; VICTOR E. SHAPLEY,

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MICHIGAN PUBLIC SERVICE COMMISSION, A Commission of the State of Michigan; ERIC J. SCHNEIDEWIND; DANIEL DEMLOW; ROBERT FISCHER and GERALD IRWIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit decided and filed April 25, 1986.

OPINION BELOW

The opinion of the Court of Appeals decided and filed on April 25, 1986 (Appendix A), is reported at 789 F.2d 370 (6th Cir., 1986).

JURISDICTION

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit is founded upon 42 U.S.C. § 1254(1).

The opinion of the Court of Appeals (Appendix A), was decided and filed April 25, 1986. A Petition for Rehearing was not filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment XIV, Section One, provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights Act of 1871, 42 U.S.C. Section 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This is an action arising under § 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.

In March of 1975, Appellant Shapley and the former owner of two small Michigan telephone companies, Mesick Telephone Company and Northern Telephone Company, Mr. James R. Hoogesteger, entered into an agreement whereby Appellant National Communications Systems, Inc. (hereinafter referred to as "Appellant NCSI"), was formed as a Michigan corporation, and acquired, as a holding company, all of the stock and assets of Mesick and Northern.

Appellant NCSI, in order to provide reasonable and satisfactory service to the customers of Mesick and Northern, undertook the planning, financing and construction of capital improvements in the geographical area served by Northern Telephone Co., and Mesick Telephone Co.

On September 30, 1976, Northern Telephone Co., in accordance with the rules and procedures of the Michigan Public Service Commission (hereinafter referred to as "MPSC"), filed a request for approval of the borrowing of funds to finance the improvements. On February 2, 1977, Northern Telephone Co. filed a second petition with the MPSC for approval of a $47,000.00 rate increase to its consumers.

Thereafter Northern Telephone Co., and Appellant Shapley were the victims of maliciously motivated abuse of the regulatory process with the intended result of destroying Appellants' property and business.

Specifically, Appellees, past and present members of the MPSC, intentionally and maliciously delayed action on Appellants' petitions for unreasonable lengths of time, without regulatory justification. Forty-three months elapsed from the time Northern Telephone Co. filed its petitions to the time the MPSC issued an Order.

Additionally, Appellees fired a MPSC auditor when the auditor, at Appellees' request, would not falsify his calculations in order to defeat Appellants' request for a rate increase. Appellees thereafter appointed an independent appraiser to determine the value of Appellants' property and facilities, a value used as a factor in the rate setting process. As was done to the discharged MPSC auditor, Appellees also harassed the independent appraiser to the point of causing him to substantially understate the value of Appellants' property and facilities.

Moreover, Appellees intentionally and maliciously caused the disruption of telephone service to Appellants' customers by physically destroying Appellants' lines and other equipment, and then aggressively solicited public criticism and complaints from Appellants' customers about Appellants' telephone services.

Lastly, Appellees intentionally and maliciously caused Appellants' costs and expenses incurred in the regulatory proceeding to be unjustifiably increased to more than $200,000.00 for the purpose of destroying Appellants' ability to provide telephone service to its customers.

Appellants have claimed that Appellees, under color of law, abused the regulatory power entrusted to them for the purpose of destroying Appellants' property. By virtue of Appellees' abusive conduct, Appellants further claim that the Appellees' conduct caused both Appellant NCSI and Appellant Shapley to be subjected to the deprivation of rights secured to them by the 14th Amendment to the Constitution, in violation of 42 U.S.C. § 1983. Particularly, Appellees Demlow and Schneidewind established, through the power and authority vested in them as commissioners of the MPSC, a policy of destroying small telephone companies, including Appellants.

In the District Court, in lieu of filing an Answer to Appellants' Complaint, Appellees filed a Motion to Dis-

miss pursuant to F.R.Civ.P. 12(b)(1), on the ground that the District Court lacked subject matter jurisdiction on the cause asserted and that the Complaint failed to state a claim upon which relief could be granted.

At the time of hearing on the Motion to Dismiss, Appellees argued essentially three points: (1) that Appellants' action was a claim of damages against the State of Michigan and was, therefore, barred by the Eleventh Amendment; (2) that Appellants' action was barred because of their failure to exhaust, through appeal, the procedures available to them administratively under State law; and (3) that venue of the action was improperly laid in the Eastern District of Michigan.

Appellants asserted in response that the individual Appellees, sued in their individual capacity, are "persons" within the meaning of 42 U.S.C. § 1983, and are individually responsible for their malicious acts, in violation of the Civil Rights Act; that their action was not barred because of their failure to resort to State remedies; and that venue was properly laid in the Eastern District of Michigan. The District Court, *sua sponte*, raised the issue of abstention under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and determined that the case should be dismissed on this ground.

The District Court entered an "Order Granting Defendants' Motion to Dismiss, and Judgment," stating in pertinent part:

> "IT IS ORDERED that the claims against the Michigan Public Service Commission and the individual defendants in their official capacities is DISMISSED as required by the Eleventh Amendment.
>
> "For reasons stated on the record in open court, IT IS ORDERED that the due process claims against

> the individual defendants in their individual capacities are DISMISSED as required by *Parratt* v. *Taylor*, 451 US 527 (1981); *Hudson* v. *Palmer*, __ US __, 104 S Ct 3194 (1984), and *Lee* v. *Western Reserve Psychiatric Habilitation Center*, No. 83-3421 (6th Cir 1984).
>
> "For reasons stated on the record in open court, IT IS ORDERED that all remaining claims are DISMISSED as required by *Burford* v. *Sun Oil Co.*, 319 US 315 (1943) and *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 US 100 (1981)."

On April 25, 1986, the Court of Appeals for the Sixth Circuit affirmed the District Court's opinion (Appendix A).

The Court of Appeals held that Appellants failed to plead the inadequacy of state processes. Additionally, in regard to Appellants' equal protection claim brought under § 1985(3), the Court of Appeals, recognizing that the District Court did not specifically address this claim, nevertheless affirmed dismissal of the claim on the premise that review of the record indicates that this claim will not lie. The Court of Appeals reasoned that "small telephone companies are not members of a discrete and insular minority of the sort that has traditionally received special protection under the suspect classification analysis of the fourteenth amendment" (Appendix A).

Appellants have not filed a Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision is inconsistent with accepted precedents of this Court. Likewise, the opinions of other lower federal courts have not been followed.

The Court of Appeals' decision, contrary to precedent and the intent of Congress, eliminates a person's right to file a substantive ("constitutional tort") claim in federal court, pursuant to 42 U.S.C. § 1983, instead forcing the person to file in state court.

I.

THE COURT OF APPEALS ERRED IN DISMISSING APPELLANTS' DUE PROCESS CLAIMS AGAINST APPELLEES ON THE GROUND THAT THESE CLAIMS WERE BARRED BY *PARRATT* v. *TAYLOR, HUDSON* v. *PALMER*, AND *VICORY* v. *WALTON*.

The Court of Appeals in its opinion categorized the instant action as "simply a Section 1983 suit for deprivation of property without *procedural* due process" (Appendix A). (Emphasis added) Relying on the rule adopted by this Court in *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), as expanded by *Hudson* v. *Palmer*, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 393 (1984), in conjunction with *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir., 1983), the Court of Appeals ruled, *inter alia*, that, "Plaintiffs failed to plead the inadequacy of state process," (Appendix A). The Court of Appeals therefore dismissed Appellants' suit.

A. The *Parratt/Hudson/Vicory* Rule Does Not Apply To Those Due Process Violations/Deprivations Which Rise To The Level Of "Constitutional Torts."

This Court has long recognized that a 42 U.S.C. Sec. 1983 action alleges a *substantive* due process violation if the state actor's conduct is "abhorrent" or "shocks the conscience" of the Court. *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 113 (1952). If the state actor's tortious conduct is "abhorrent," "shocks the conscience," or is an "abuse of power," the tortious conduct

rises to the level of a constitutional tort, and a § 1983 action may be brought in federal court notwithstanding the availability of state tort remedies. *Daniels* v. *Williams*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 622 (1986); *Davidson* v. *Cannon*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 677 (1986). The Court of Appeals' decision is a significant departure from these cases.

Appellants believe that the *Hudson, supra,* Court, in dictum, makes a distinction between "intentional" deprivation and an abhorrent abuse of governmental power, recognizing that Hudson's conduct could not be categorized as an abhorrent abuse of governmental power. As was stated:

> "The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signaling his intent."
>
> 82 L.Ed.2d at 407.

Appellants submit that a state actor who abhorrently intends to abuse his governmental power, such as Appellees in the case at bar, will not take affirmative steps to avoid signaling his intent, but will: (1) overtly prolong the state procedural process in order to effectuate the destruction of property belonging to another (Appendix C); (2) overtly discharge an employee because the employee refused to participate in a conspiracy to destroy property belonging to another (Appendix C); and (3) overtly disrupt the service that an individual provides to his customers in order to create a basis in

which that individual's customers might then substantively allege poor quality of service (Appendix C).

In *Daniels, supra,* this Court granted *certiorari* to provide guidance to lower courts in determining when tortious conduct by state officials rises to the level of a constitutional tort.

Justice Rehnquist, in the *Daniels* opinion, recognized and adopted Justice Powell's *Parratt, supra,* concurring opinion, noting:

> ". . . not only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been no *affirmative abuse of power.*'" (Emphasis added)
>
> 88 L.Ed.2d at 667.

The *Daniels* opinion made clear that the Due Process Clause requires the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property . . .",

> "And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., *Rochin, supra,* it serves to prevent governmental power from being 'used for purposes of oppression, . . .'"
>
> 88 L.Ed.2d at 668.

Contrary to the Supreme Court's decisions in *Daniels, supra,* and *Davidson, supra,* the Sixth Circuit Court of Appeals failed to consider the affirmative acts of misconduct alleged in ¶¶ 17, 18 and 20 of Appellants' Complaint (Appendix C). As noted in these paragraphs of the Complaint, Appellees affirmatively abused the power of their office, including the following acts as set forth in the Complaint:

(1) they intentionally delayed action on Appellants' petitions, for unreasonable lengths of time;

(2) they fired a Michigan Public Service Commission auditor when the auditor, at Appellees' request, would not falsify his calculations in order to defeat Appellants' request for a rate increase;

(3) they replaced the discharged auditor with an independent appraiser and thereafter harassed the independent appraiser to the point of causing the appraiser to substantially understate the value of Appellants' property and facilities;

(4) they intentionally caused the disruption of telephone service to Appellants' customers by physically destroying Appellants' telephone lines and other equipment, and then aggressively solicited public criticism and complaints from Appellants' customers about Appellants' services, and

(5) they intentionally caused Appellants costs and expenses incurred in the regulatory proceeding to be unjustifiably increased for the purpose of destroying Appellants' ability to provide telephone service to its customers.

Accepting the allegations in Appellants' Complaint as true, *Hughes* v. *Roe*, 449 U.S. 5, 10 (1980); *Rymer* v. *Douglas County*, 764 F.2d 796 (11th Cir., 1985), Appellees affirmatively abused their governmental power, and used their governmental power as an instrument of oppression. *Daniels, supra*, 88 L.Ed.2d at 667 and 668. Indeed, Appellees' conduct approached "the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson, supra*, 88 L.Ed. at 682. Under the circumstances, Appellants submit that the Court of Appeals erred in failing to consider the

substantive abuse of powers which were here used for the purpose of destroying Appellants' property.

The Sixth Circuit Court of Appeals, in determining whether a state actor's tortious conduct rises to the level of a constitutional tort, has adopted the standard of whether the state actor's conduct "shocks the conscience." *Wilson* v. *Beebe*, 743 F.2d 342 (6th Cir., 1984). (See also *Rymer, supra*, wherein the Eleventh Circuit Court of Appeals applied the standard of "abuse of government power"; *Delahoussaye* v. *Seale*, 605 F.Supp. 1525 (W.D. Louisiana, 1985), wherein the District Court considered both the "conscience shocking" and "excessively abusive conduct which is inherently impermissible.") Although *Wilson, supra*, involved an issue of deprivation of a life or liberty interest, whereas the instant case involves an issue of deprivation of a property interest, the Sixth Circuit has applied the above standard to cases involving a deprivation of property interest. See, e.g., *Vasquez* v. *City of Hamtramck*, 757 F.2d 771 (6th Cir., 1985).

In *Vasquez, supra*, plaintiff brought a § 1983 action alleging a conspiracy, involving a Hamtramck, Michigan police officer, to maliciously prosecute plaintiff by issuing parking tickets.

Plaintiff there claimed that he was involved in an altercation in Detroit with appellee Schneider, a Detroit hospital security guard. Schneider worked at the hospital with appellee Misiak, who was a City of Hamtramck police officer as well as a part-time hospital security guard. Vasquez alleged that Schneider told Misiak the license plate number of Vasquez' car and that Misiak maliciously and without probable cause wrote and filed two tickets for the illegal parking of Vasquez' car in Hamtramck. Vasquez claimed that he had never been in Hamtramck.

The *Vasquez* court explained that since the parking tickets are civil infractions which are punishable by fine only, Vasquez' potential loss was limited to the monetary loss and inconvenience of contesting the tickets. Accordingly, the deprivation was recognized as a property deprivation. *Id.* at 773. The Court of Appeals dismissed Vasquez' suit pursuant to *Parratt, supra, Hudson, supra,* and *Baker* v. *McCollan,* 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 443 (1979).

In dictum, the *Vasquez* court, however, did state:

> "The only possible remaining constitutional claim Vasquez could make here is that appellees' actions were so egregious as to violate substantive due process. This claim is without merit. While appellees' alleged conduct was reprehensible, it was not that type of conduct which so 'shocks the conscience' that it violates appellant's substantive due process rights. *See Rochin* v. *California,* 342 U.S. 165, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). A citizen does not suffer a constitutional deprivation every time he is subject to the petty harrassment of a state agent."
>
> *Id.* at 773.

A review, and liberal construction of Appellants' Complaint[1] (Appendix C) in the present case, shows that Appellants have alleged more than "a petty harrassment" by Appellees, and, in fact, have alleged a conscience-shocking abuse of governmental power.

---

[1] *Hudson, supra,* citing *Boag* v. *MacDougall,* 454 U.S. 354, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); *Haines* v. *Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

B. The *Parratt/Hudson* Rule Does Not Apply To Conspiratorial, As Opposed To Random And Unauthorized Acts Of Misconduct By Government Officers And Employees, Where The Wrongdoers Themselves Are In A Position To Afford The Victim Of Their Conspiracy Due Process Of Law.

The rationale underlying the Supreme Court decisions in both *Parratt* and *Hudson* is that negligent and intentional deprivations of property are not actionable as Fourteenth Amendment violations because: (1) the State cannot reasonably be expected to foresee random and unauthorized acts of misconduct, and, therefore, it is impracticable to provide a predeprivation hearing with regard to the failure of state employees to follow established state procedures; and (2) if, in fact, the state does provide a meaningful postdeprivation remedy for the wrong committed, there is no violation of the Fourteenth Amendment because an appropriate and constitutionally sufficient vehicle to afford procedural due process is provided. The issue presented in the present case is whether Appellants have alleged an actionable violation of the Fourteenth Amendment. Appellants submit that, because of the circumstances giving rise to their cause of action, Appellees are estopped from relying on the rule of *Parratt* and *Hudson* for the following reasons:

(1) The misconduct alleged in Appellants' Complaint was neither random nor, by reason of the authoritative position held by each Appellee, unauthorized. Thus, the Complaint, in ¶¶ 20 and 21 (Appendix C) alleges:

> "(20) The defendants did each and severally combine and conspire with each other and with other unnamed persons, under color of law, to deprive Plaintiffs of rights guaranteed to

them by the Constitution and law of the United States, contrary to 42 USCA § 1985(3).

"(21) The acts and omissions of Defendants as hereinabove set forth constitute a conspiracy for the purpose of depriving directly or indirectly the Plaintiffs of the constitutionally guaranteed right of equal protection of the laws and due process of law and for the purpose of preventing duly constituted state authorities from securing to the Plaintiffs equal protection of the laws and due process of law, contrary to 42 USCA § 1985(3)."

The misconduct alleged in the Complaint (Appendix C) was neither random nor unauthorized; rather, it was part and parcel of a concealed (see Complaint, ¶ 22, Appendix C) plan and agreement between the Appellees to deprive National Communications and Mr. Shapley of their property without due process of law.

(2) Appellees, in their positions as Commissioners of the Michigan Public Service Commission (i.e., Appellees Schneidewind and Demlow) and as officers of the Commission staff (i.e., Appellees Fischer and Irwin) were each in a position, but for their agreement and conspiracy to act otherwise, to afford Appellants a predeprivation hearing "at a meaningful time and in a meaningful manner," *Parratt, supra,* 68 L.Ed.2d at 432. Accord, *Augustine* v. *Doe,* 740 F.2d 322 (5th Cir., 1984).

In *Augustine, supra,* the court, citing *Hudson, supra,* explained that the "controlling question" in determining the applicability of *Parratt* is "whether the State is in a position to provide for predeprivation process." *Id.* at 327. The *Augustine* court additionally stated:

"If, however, the state is able to provide the affected individual with a hearing before the deprivation

> occurs, due process usually requires that the state do so . . . . The availability of a postdeprivation tort remedy does not satisfy the requirements of due process in such cases . . . ."
>
> *Id.* at 328.

If the Appellees, for a lawful or unlawful reason, believed that Appellants' telephone companies were not being properly operated in the public interest, the rules of the Commission provide for a complaint and hearing procedure which may be invoked by any person or by the Commission on its own motion. Rule R 460.31 of the Michigan Administrative Code (1979) provides as follows:

> "(1) A complaint shall be limited to matters involving alleged unlawful or unreasonable acts, practices or omissions of a utility or carrier. A complaint may be either formal or informal and may be made by a person having good or sufficient reason therefor or by the commission on its own motion.
>
> "(2) An informal complaint shall be in writing and signed by complainant, and contain a concise statement of the facts involved and the name and address of the complainant and the party complained against. The commission will attempt to settle problems arising under an informal complaint without formal action when possible."

Moreover, under the Michigan General Court Rules in effect at the time of the occurrences at issue in this case, each Appellee was authorized to apply to the Michigan Attorney General to bring an action of *quo warranto* against Appellants for forfeiture of their charter, and, upon failure of the Attorney General to act, each Appellee was likewise authorized to apply to the appro-

priate circuit court to bring the action themselves. See GCR 1963, 715 (as replaced by MCR 3.306). (A quo warranto was filed against Appellants, however, two weeks after the MPSC issued its Order concerning Appellants' petitions for finance and rate increase.) In short, meaningful and timely predeprivation process was available to the individual Appellees in the present case, and resort to such process was entirely within the scope of the authority vested them by the statutes, regulations and General Court Rules of Michigan. Appellees chose instead to engage privately in a conspiracy to take Appellants' property.

In light of the facts alleged in the Complaint (Appendix C), it is Appellants' position that the individual Appellees now before the Court are estopped to assert that their acts did not constitute a violation of the Fourteenth Amendment. The intentional acts alleged in the Complaint (Appendix C) occurred over an extended period of time and were neither random nor, considering the official and employees involved, unauthorized. Appellants, therefore, submit that the Court of Appeals erred in dismissing their due process claims against the individual Appellees, since the principal justification underlying the *Parratt/Hudson* rule has no application to the facts of this case.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 21, 1986

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
See Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed April 25, 1986)

(NATIONAL COMMUNICATION SYSTEMS, INC., A Michigan Corporation; VICTOR E. SHAPLEY, Plaintiffs-Appellants, v. MICHIGAN PUBLIC SERVICE COMMISSION, a Commission of the State of Michigan; ERIC J. SCHNEIDEWIND; DANIEL DEMLOW; ROBERT FISCHER and GERALD IRWIN, Defendants-Appellees — ON APPEAL from the United States District Court for the Eastern District of Michigan; Docket No. 85-1159)

Before: MERRITT and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

MERRITT, Circuit Judge.

Plaintiffs-appellants Victor E. Shapley and National Communications Systems, Inc. appeal the District Court's order dismissing their civil rights action. We affirm.

I.

In March, 1975, plaintiff Shapley formed plaintiff National Communications [*sic*] Systems, Inc. as a Michigan corporation. Shapley entered into an agreement with the owner of Mesick and Northern Telephone com-

panies, two small telephone companies operating in Michigan, under which National acquired as a holding company all the stock of the two telephone companies. The telephone companies needed a substantial financial investment in their facilities, so National undertook certain capital improvements.

On September 30, 1976, Northern Telephone Company filed a request for the Michigan Public Service Commission's approval of the borrowing of funds to finance the improvements. On February 2, 1977, Northern Telephone Company filed a second petition with the Michigan Public Service Commission, this time seeking approval of a $47,000 annual rate increase.

Plaintiffs allege that thereafter, Northern Telephone Company and Shapley were subjected to maliciously motivated abuse of the regulatory process by defendants-appellees, members of the Michigan Public Service Commission and the Commission itself, with the intended result of destroying plaintiffs' property and business. According to plaintiffs' complaint, defendants intentionally delayed action on plaintiffs' petitions for unreasonable lengths of time without regulatory justification. Additionally, defendants allegedly asked the commission's auditor to falsify his calculations in order to defeat plaintiffs' request for a rate increase. When the auditor refused, defendants fired him. Defendants then appointed an independent appraiser to determine the value of plaintiffs' property and facilities, a value used as a factor in the rate setting process. Defendants allegedly harassed the appraiser and constrained him to substantially understate the value. Moreover, plaintiffs allege, defendants intentionally caused the disruption of telephone service to plaintiffs' customers by physically destroying plaintiffs' lines and other equipment and then aggressively solicited public criticism and complaints from plaintiffs' customers

about plaintiffs' telephone service. Finally, plaintiffs allege that defendants intentionally caused plaintiffs' costs and expenses incurred in the regulatory proceeding to be unjustifiably increased to more than $200,000 for the purpose of destroying plaintiffs' ability to provide telephone service to their customers.

II.

On May 4, 1984, plaintiffs filed this action under 42 U.S.C. § 1983, alleging that defendants had, under color of state law, deprived plaintiffs of their property without due process of law, and under section 1985(3), alleging that defendants had conspired to deprive plaintiffs of equal protection and due process. The named defendants in the suit are the Michigan Public Service Commission and four present and past members of the commission. By this suit, plaintiffs sought $5,000,000 in damages. Defendants moved to dismiss the complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted. After a hearing on the motion, the District Court granted the motion in part.

The District Court ruled that the eleventh amendment barred the plaintiffs' action against the Michigan Public Service Commission and against the commissioners in their official capacities. The District Court judge further ruled that if plaintiffs' action against the commissioners attempted to reach them in their individual capacities, the due process claim should be dismissed as required by *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 104 S.Ct. 3194 (1984). Lastly, the judge determined, *sua sponte*, that he should abstain from exercising jurisdiction over this action and dismissed any remaining claims under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Fair Assessment in Real Estate Association* v. *McNary*, 454 U.S. 100 (1981).

III.

At oral argument plaintiffs' counsel admitted that the District Court properly dismissed the claims against the Michigan Public Service Commission and any claims against the commissioners in their official capacity. Plaintiffs do not appeal the District Court's order in this respect, and we therefore state no opinion on the eleventh amendment issue.

IV.

Plaintiffs' appeal centers mainly around the District Court's dismissal of their individual-capacity § 1983 claim against the commissioners alleging the deprivation of a property interest without procedural due process. Plaintiffs do not allege a taking under the fifth amendment, a seizure of property under the fourth amendment, or any other claim incorporated by the fourteenth amendment's due process clause. This then is simply a § 1983 damage suit for deprivation of property without procedural due process. In *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 125 (1984), this Court dealt with another such suit and held:

> in section 1983 damage suits for deprivation of property without procedural due process the plaintiff has the burden of pleading and proving the inadequacy of state processes, including state damage remedies to redress the claimed wrong.

721 F.2d at 1063. This requirement was imposed under the authority of *Parratt* v. *Taylor, supra*, and the Supreme Court applied a similar requirement a year after *Vicory* in *Hudson* v. *Palmer, supra*.

Plaintiffs failed to plead the inadequacy of state processes. On appeal they advance two arguments relevant to this point. First, plaintiffs argue that the requirement

of showing the inadequacy of state remedies, which grew out of *Parratt*, applies only to deprivations caused by random and unauthorized acts of misconduct, as opposed to the alleged conspiratorial acts involved in the case at bar where the alleged conspirators are the public officials whose duty it was to see that plaintiffs were not denied due process. Plaintiffs advance no authority for this contention. In *Vicory* the Court rebuffed a similar attempt to distinguish *Parratt*.

> As we read *Parratt*, the principle being applied does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct[1] or is based on strict liability. Nor does it matter whether the writ at common law would be in detinue (action for wrongful detention of a chattel by a bailor), trespass *de bonis asportatis* (action for carrying away plaintiff's chattels), trespass on the case (roughly speaking, an action for negligence) or a motion in a criminal case for return of property held as evidence. The reasoning of *Parratt* appears to extend at least to all section 1983 cases claiming a procedural due process injury to a property interest . . . .[2]

721 F.2d at 1065.

Plaintiffs next argue that any existing state law remedies are per se inadequate because state law clothes the commissioners in absolute immunity from liability in a suit for

---

[1] The Supreme Court recently closed the possibility of a § 1983 procedural due process case based on negligent conduct. *Daniels* v. *Williams*, 106 S.Ct. 662 (1986); *Davidson* v. *Cannon*, 106 S.Ct. 668 (1986).

[2] This requirement has also been extended to § 1983 procedural due process cases involving liberty interests. *Wilson* v. *Beebe*, 770 F.2d 578 (6th Cir. 1985) (en banc); cases cited *supra* note 1 (apparently extending this requirement *sub silentio*).

damages based on the commissioners' official conduct. In *Hudson* v. *Palmer*, the Supreme Court dealt with a similar contention. The Court examined state law on the immunity question and determined that the defendant would not be entitled to sovereign immunity. 104 S.Ct. at 3205. The Supreme Court of Michigan recently addressed the sovereign immunity issue in some detail. *Ross* v. *Consumers Power Co.*, 420 Mich 567, 363 N.W.2d 641 (1984). In regard to the question of immunity of government officials, the court held:

> We therefore hold that judges, legislators, and the highest executive officials of all levels of government are absolutely immune from all tort liability whenever they are acting within their judicial, legislative, or executive authority. Lower level officials, employees, and agents are immune from tort liability only when they are
>
> 1) acting during the course of their employment and acting, or reasonably believe they are acting, within the scope of their authority;
>
> 2) acting in good faith; and
>
> 3) performing discretionary, as opposed to ministerial acts.
>
> Under this test, no individual immunity exists for *ultra vires* activities.

420 Mich. at 633-34, 363 N.W.2d at 667-68.

The defendant commissioners are not "highest executive officials" entitled to absolute immunity against claims such as the ones here for malicious destruction of property. Therefore, as is the case with other lower level state officials, the commissioners are immune from tort liability under state law only if, among other things, the commissioners' acts giving rise to potential liability were com-

mitted in good faith. Plaintiffs allege that defendants acted with malice and an intent to ruin plaintiffs' business and to deprive them of property. If plaintiffs were to prove their allegations in state court, the requirement of good faith action would defeat the defendant commissioners' claim to individual immunity. We are, therefore, of the opinion that the individual defendants would not enjoy sovereign immunity if plaintiffs pursued the remedies afforded by state procedures. It may be that plaintiffs would not be entitled, under state law, to the same relief potentially available in an action brought under Civil Rights Act. Nevertheless, it has long been recognized that the fact that state procedures would not afford relief identical to that sought in the civil rights action does not make those procedures constitutionally inadequate. *Parratt* v. *Taylor*, 451 U.S. at 544; *Hudson* v. *Palmer*, 104 S.Ct. at 3204.

In short, Michigan law presents a variety of procedures to redress the wrongs that plaintiffs assert. Not only could plaintiffs have taken an appeal from the regulatory proceedings before the Public Service Commission, but they could have brought a state law action in tort or restitution, not to mention seeking one of the different extraordinary writs available to force the commissioners to cease intentionally acting outside their authority. Plaintiffs failed to show that these available procedures did not afford the process that is due under the fourteenth amendment.

V.

The District Court did not deal specifically with plaintiffs' equal protection claim brought under § 1985(3). Nevertheless, it appears clearly from the record that this claim will not lie, and we affirm the dismissal of the claim.

Plaintiffs allege that defendants denied them equal protection by classifying all telephone companies operating in Michigan according to size and then intentionally discrimi-

nating against the small telephone companies. In *Browder* v. *Tipton*, 630 F.2d 1149 (6th Cir. 1980), this Court held that the "equal protection of the laws" language of § 1985(3) protected only the "so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherently personal characteristics." 630 F.2d at 1150. Additionally, "[s]ection 1985(3) clearly does not reach all torts or equal protection violations measured by the rationality test." 630 F.2d at 1159. Small telephone companies are not members of a discrete and insular minority of the sort that has traditionally received special protection under the suspect classification analysis of the fourteenth amendment. We therefore conclude that plaintiffs' § 1985(3) claims do not state a claim upon which relief can be granted.[3]

VI.

Accordingly, we affirm the District Court's dismissal of all claims involved in this action.

---

[3] At oral argument, plaintiffs' counsel maintained that the equal protection claim was brought under § 1985(3) only. We therefore need not consider whether the above holding would also apply to an equal protection claim asserted under § 1983. Likewise, we state no opinion on the District Court's dismissal of the claims on alternative grounds of abstention and comity.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, AND JUDGMENT

(United States District Court —
Eastern District of Michigan —
Northern Division)

(Filed January 28, 1985)

(NATIONAL COMMUNICATIONS SYSTEMS, INC., A Michigan Corporation and VICTOR E. SHAPLEY, Plaintiffs, -vs- MICHIGAN PUBLIC SERVICE COMMISSION, a Commission of the State of Michigan; ERIC J. SCHNEIDEWIND, Chairman of the Michigan Public Service Commission; DANIEL DEMLOW, former Chairman of the Michigan Public Service Commission; ROBERT FISCHER, Director of the Michigan Public Service Commission; and GERALD IRWIN, Director of the Communications Division of the Michigan Public Service Commission, Defendants — NO: 84 CV 9240 BC)

At a session of said court, held in the Federal Building, Bay City, Michigan on the 28th day of January, 1985.

PRESENT: HONORABLE JAMES P. CHURCHILL,
United States District Judge.

On January 24, 1985, oral argument was heard on defendants' motion to dismiss.

IT IS ORDERED that the claims against the Michigan Public Service Commission and the individual defendants in their official capacities is DISMISSED as required by the Eleventh Amendment.

For reasons stated on the record in open court, IT IS ORDERED that the due process claims against the individual defendants in their individual capacities are DISMISSED as required by *Parratt* v *Taylor*, 451 U.S. 527 (1981); *Hudson* v *Palmer*, __ US __, 104 S.Ct. 3194 (1984), and *Lee* v

Western Reserve Psychiatric Habilitation Center, No. 83-3421 (6th Cir. 1984).

For reasons stated on the record in open court, IT IS ORDERED that all remaining claims are DISMISSED as required by *Burford* v *Sun Oil Co.*, 319 U.S. 315 (1943) and *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981).

IT IS SO ADJUDGED.

/s/ James P. Churchill
UNITED STATES DISTRICT JUDGE

C-1

COMPLAINT

(United States District Court —
Eastern District of Michigan —
Northern Division)

(Dated May 4, 1984)

(NATIONAL COMMUNICATIONS SYSTEMS, INC., a Michigan corporation; and VICTOR E. SHAPLEY, Plaintiffs, vs. MICHIGAN PUBLIC SERVICE COMMISSION, a Commission of the State of Michigan; ERIC J. SCHNEIDEWIND, Chairman of the Michigan Public Service Commission; DANIEL DEMLOW, former Chairman of the Michigan Public Service Commission; ROBERT FISCHER, Director of the Michigan Public Service Commission; and GERALD IRWIN, Director of the Communications Division of the Michigan Public Service Commission, Defendants — Civil Action No. _____)

NOW COME Plaintiffs in the above entitled matter, by and through their attorneys, Patterson, Gruber & Kennedy, and show unto this Honorable Court as follows:

1. Plaintiff National Communications Systems, Inc. is a corporation organized and existing under the laws of the State of Michigan with its principal place of business located in the County of Saginaw, State of Michigan. At all times material herein, said Plaintiff was the owner of two companies, Mesick Telephone Company and Northern Telephone Company, which provided telephone and related services to consumers in certain areas of northwestern Michigan.

2. Plaintiff Victor E. Shapley is an adult citizen of the United States with his residence located in the County of Saginaw, State of Michigan.

3. Defendant Michigan Public Service Commission is a public commission created by the Legislature of the State

of Michigan pursuant to the authority vested in the Legislature by the Constitution of the State of Michigan. Said Defendant, by virtue of 1939 PA 3, as amended, is charged with regulation and control of public utilities and other services affected with a public interest in the State of Michigan.

4. Defendants Daniel Demlow and Eric Schneidewind are adult citizens of the State of Michigan and, at all times material herein, were duly appointed and acting commissioners of the Michigan Public Service Commission.

5. Defendants Roger Fischer and Gerald H. Irwin are each adult citizens of the State of Michigan and, at all times material herein, employees and/or agents of the State of Michigan and members of the regulatory staff of the Michigan Public Service Commission. At all times material herein, Defendant Fischer was the Acting Director and Director of the Michigan Public Service Commission and Defendant Irwin was the Director of the Communications Division thereof.

6. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, and under the Civil Rights Act of 1871, particularly 42 U.S.C. § 1983.

7. This Court has jurisdiction of this cause under and by virtue of 28 U.S.C. § 1343(3).

8. At all times material herein, it was the responsibility and duty of Defendants, and each of them, to regulate and control public utilities and services affected with a public interest within the State of Michigan, including within the scope of such regulatory responsibility the duty to provide just and reasonable telephone rates which for the consumer are neither oppressive nor permissive of exhorbitant and speculative profits and which for the utility are sufficient to cover all reasonable costs of doing

business and a fair and reasonable return on the equity invested.

9. For the purpose of discharging its regulatory responsibility, the Michigan Public Service Commission, the commissioners thereof, and the employees of its staff, including Defendants herein, are accorded certain administrative powers and responsibilities, including but not limited to the following:

(a) the power and jurisdiction to regulate all rates, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of public utilities, including telephone companies, pursuant to MCLA 460.6; and

(b) the power to adopt such rules and procedures for the filing, investigation and hearing of petitions or applications to increase or decrease utility rates and charges as the Commission shall find necessary or appropriate to enable it to reach a decision with respect to petitions or applications within a period of 9 months from the filing thereof, pursuant to MCLA 460.6a(2).

10. Pursuant to the power vested in the Commission to adopt rules and procedures as aforesaid, certain rules were promulgated setting forth the practice and procedure applicable in proceedings before the Michigan Public Service Commission, said rules appearing as Rules 460.11 *et seq* of the 1979 Michigan Administrative Code.

11. On or about March 26, 1975, Plaintiff Victor E. Shapley entered into certain agreements with James R. Hoogesteger whereby Plaintiff National Communications Systems, Inc. was incorporated and acquired as a holding company all of the stock and assets of Mesick Telephone Company and Northern Telephone Company, which

were then and thereafter telephone companies furnishing service to communities in northeastern Michigan.

12. The condition of the telephone plant in service which National Communications Systems, Inc. acquired as aforesaid was such that a substantial investment in the facilities and equipment of the two companies was required in order to provide reasonable and satisfactory service to customers of the Mesick and Northern companies.

13. In light of the requirements then existing, National Communications Systems, Inc. undertook the planning, financing and construction of capital improvements first in the geographical area served by Northern Telephone Company and, later, in the geographical area served by Mesick Telephone Company.

14. On or about September 30, 1976, Northern Telephone Company, as the operating telephone company, filed in accordance with the rules and procedures of the Michigan Public Service Commission a request for approval of the borrowing of funds to finance telephone system improvements in its service area (MPSC Case No F-876), and, on or about February 2, 1977, Northern Telephone Company filed for approval of a rate increase to consumers totalling approximately $47,000 annually (MPSC Case No U-5338).

15. Notices of hearing on the aforesaid applications were thereafter issued in accordance with the rules and procedures of the Michigan Public Service Commission.

16. In considering the several applications filed by Northern Telephone Company, it was the duty of Defendants, and each of them, to conduct themselves in their official capacity so as not to subject, under color of any statute, rule, regulation, procedure, custom or usage, any citizen of the United States, including Plaintiffs herein, to the deprivation of any rights secured to them by

the Constitution of the United States, including the constitutional guarantees of due process of law and equal protection of the laws.

17. Defendants, and each of them, while acting in their official capacity, did subject or did cause Plaintiffs herein to be subjected under color of the statutes, rules, procedures, customs and usages pertaining to, promulgated by and applicable in the practice of the Michigan Public Service Commission to the deprivation of rights secured to them by the Fourteenth Amendment to the Constitution of the United States, in that:

(a) Contrary to law but under color of law, Defendants Demlow and Schneidewind did establish and effectuate through the power and authority vested in them as commissioners of the Michigan Public Service Commission a policy of destroying by overbearing and unlawful regulation small telephone companies, including but not limited to the telephone companies operated by Plaintiff National Communications Systems, Inc.;

(b) Contrary to law but under color of law, Defendant Michigan Public Service Commission, through the instrumentality of its staff, did intentionally cause the regulatory powers vested in the Commission to be used for the purpose of destroying the business and assets of Plaintiffs herein, contrary to law and in knowing disregard of the public interest; and

(c) Contrary to law but under color of law, Defendants Fischer and Irwin did intentionally cause the rules and procedures of the Commission staff not to be used for the purpose of lawful regulation, but rather for the purpose of destroying the business and assets of Plaintiffs herein and of confiscating the property of Plaintiffs for an unlawful purpose.

18. The acts undertaken by Defendants herein to effectuate, under color of law, their purpose to destroy small telephone companies in general and the companies owned and operated by National Communications Systems, Inc. in particular include by way of illustration the following:

(a) Defendants did intentionally cause the applications filed by Northern Telephone Company and subsequent applications filed by Mesick Telephone Company to be delayed, without regulatory justification, for unreasonable lengths of time;

(b) Defendants did intentionally cause the recommendations concerning calculation of the rate base of Plaintiffs' operating companies, made by an assigned, experienced and qualified auditor of the Commission staff to be rejected without cause in fact and, upon refusal of the staff member to cooperate in making fictitious adjustments in his calculations, did cause the said staff employee to be removed from his assignment to the rate case and subsequently discharged from his employment;

(c) Defendants did intentionally cause the expert resources of the Commission staff to be used for the purpose of destroying the Plaintiffs' telephone companies;

(d) Defendants did intentionally cause the costs and expenses incurred by Plaintiffs in the regulatory proceeding to be unjustifiably increased (to an amount in excess of $200,000) for the purpose of destroying the ability of Plaintiffs to provide reasonable telephone service to its customers;

(e) Defendants did intentionally undertake to directly solicit public criticism and complaints concerning the operating telephone companies;

(f) Defendants, through their agents, did intentionally cause the disruption of telephone service to customers of the aforesaid telephone companies; and

(g) Defendants, having nominated and approved an independent appraiser to conduct an appraisal of the property and telephone plant of Plaintiffs' operating companies, did harrass said appraisers and did solicit, without cause or justification, the appraisal company's cooperation for the purpose of substantially understating the value of the telephone plant in service.

19. The policy and conduct of Defendants as hereinabove set forth was intended for the purpose of and did in fact result in a deprivation to Plaintiffs of rights secured to each by the Fourteenth Amendment of the Constitution of the United States, and specifically:

(a) the right of Plaintiffs to due process of law based on fair and equitable application of the statutes, rules and procedures of the Commission, free from the unlawfully conceived and executed purpose of destroying the Plaintiffs' business;

(b) the right of Plaintiffs to equal protection of the laws, free from arbitrary, capricious and intentional discrimination in treatment based on unlawful criteria of classification, as hereinabove described.

20. The defendants did each and severally combine and conspire with each other and with other unnamed persons, under color of law, to deprive Plaintiffs of rights guaranteed to them by the Constitution and laws of the United States, contrary to 42 USCA § 1985(3).

21. The acts and omissions of Defendants as hereinabove set forth constitute a conspiracy for the pur-

pose of depriving directly or indirectly the Plaintiffs of the constitutionally guaranteed right of equal protection of the laws and due process of law and for the purpose of preventing duly constituted state authorities from securing to the Plaintiffs equal protection of the laws and due process of law, contrary to 42 USCA § 1985(3).

22. The defendants did combine and conspire as aforementioned and in furtherance of such conspiracy did conceal their wrongful conduct from the Plaintiffs, thereby depriving them of their property and/or the exercise of their rights and privileges, contrary to 42 USCA § 1985(3).

23. The acts and omissions of Defendants as hereinabove set forth were, in each instance, a proximate cause of damages to Plaintiffs herein; that said damages include but are not limited to loss of income and net profits to Plaintiff National Communications Systems, Inc.; the forced sale by National Communications Systems, Inc. through receivorship proceedings of the assets and stock of its operating telephone companies on or about November 10, 1982; losses incurred or to be incurred (as a result of guarantees and obligations personally undertaken by said Plaintiff for and on behalf of National Communications Systems, Inc. and its operating companies) by Plaintiff Victor E. Shapley by reason of the unlawful conduct of Defendants herein; and irreparable damage to the business reputation of Plaintiff Victor E. Shapley; that all said injuries and damages are permanent and/or will last into the indefinite future; and that all said injuries and damages were proximately caused by the wrongful conduct of Defendants as hereinabove set forth.

WHEREFORE, Plaintiffs pray for such damages as appear to be fair and just at the time of trial of this

cause, said damages being in the amount of Five Million ($5,000,000.00) Dollars.

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Dated: May 4, 1984

No. 86-138 (3)

In The Supreme Court of the United States

October Term, 1986

Supreme Court, U.S.
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NATIONAL COMMUNICATIONS SYSTEMS, INC., a Michigan corporation; and VICTOR E. SHAPLEY,
Petitioners,

v

MICHIGAN PUBLIC SERVICE COMMISSION, A Commission of the State of Michigan;
ERIC J. SCHNEIDEWIND, former Chairman of the Michigan Public Service Commission;
DANIEL DEMLOW, former Chairman of the Michigan Public Service Commission;
ROGER FISCHER, Director of the Michigan Public Service Commission Staff; and
GERALD IRWIN, former Director of the Communications Division of the Michigan Public Service Commission Staff,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I

DID THE LOWER COURTS PROPERLY DISMISS PETITIONERS' COMPLAINT BASED UPON PREVAILING CASE PRECEDENT, INCLUDING *PARRATT* v. *TAYLOR*, 451 U.S. 527; 101 S.CT. 1908; 68 L.ED.2D. 420 (1981), AND *HUDSON* v. *PALMER*, 468 U.S. ; 104 S.CT. ; 82 L.ED.2D. 383 (1984), DESPITE PETITIONERS' ALLEGATIONS OF A CONSPIRACY BY INDIVIDUAL STATE EMPLOYEES TO VIOLATE PETITIONERS' DUE PROCESS RIGHTS AND ALLEGATIONS OF THEIR ABUSE OF GOVERNMENT POWER, WHEN THE PETITIONERS HAVE FAILED TO ALLEGE OR SHOW INADEQUATE STATE POST-DEPRIVATION REMEDIES AND WHEN THE EXISTENCE OF ONGOING CONTEMPORANEOUS STATE REMEDIES BELIE PETITIONERS' CLAIMS?

II

DOES ANY RATIONAL BASIS EXIST TO ALTER THE *PARRATT/HUDSON* RULE WITH RESPECT TO ALLEGATIONS CONCERNING CONSPIRATORIAL CONDUCT, AS OPPOSED TO RANDOM AND UNAUTHORIZED OR INTENTIONAL ACTS OF MISCONDUCT BY GOVERNMENT OFFICERS OF EMPLOYEES, WHEN PETITIONERS HAVE FAILED TO ALLEGE OR SHOW A LACK OF ADEQUATE STATE REMEDIES?

III

DID THE LOWER COURTS PROPERLY DISMISS PETITIONERS' COMPLAINT ON THE BASIS OF ABSTENTION AND COMITY, AND IN LIGHT OF OTHER GROUNDS INDICATING THAT DISMISSAL WAS PROPER?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
INDEX OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF FACTS	2
ARGUMENT	
I PETITIONERS' CLAIMS AGAINST THE MICHIGAN PUBLIC SERVICE COMMISSION, AND THE INDIVIDUAL RESPONDENTS IN THEIR OFFICIAL CAPACITIES, WAS PROPERLY DISMISSED PURSUANT TO THE ELEVENTH AMENDMENT	6
II THE LOWER COURTS PROPERLY DISMISSED PETITIONERS' ACTION AGAINST THE MPSC COMMISSIONERS AND SENIOR STAFF IN THEIR INDIVIDUAL CAPACITIES PURSUANT TO PREVAILING CASE PRECEDENT	7
III THE LOWER COURTS PROPERLY DISMISSED PETITIONERS' EQUAL PROTECTION CLAIM BROUGHT UNDER § 1985(3)	15
IV THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' COMPLAINT PURSUANT TO THIS COURT'S PRECEDENTS CONCERNING ABSTENTION AND COMITY	18
V FEDERAL COURT JURISDICTION OVER THIS RATE CASE LITIGATION IS INCONSISTENT WITH THE JOHNSON ACT, 28 U.S.C. 1342	20
VI PETITIONER SHAPLEY, AS ONE OF THE STOCKHOLDERS IN NCSI, HAS NO STANDING TO REPRESENT NCSI IN ITS CIVIL RIGHTS ACT CLAIMS, NOR DOES NCSI AS A FORMER STOCKHOLDER OF NORTHERN HAVE STANDING TO ASSERT SUCH RIGHTS ON BEHALF OF NORTHERN	23
CONCLUSION AND RELIEF	26
ADDENDUM	1a

INDEX OF AUTHORITIES

CASES PAGE

ABATE v. *MPSC*, Ingham County Circuit Court Docket No. 83-50829-AA 14

Attorney General v. *MPSC*, Ingham County Circuit Court Docket No. 83-50827-AA 14

Attorney General v. *MPSC*, 392 Mich. 660; 221 NW2d 299 (1974) 19

Browder v. *Tipton*, 630 F.2d. 1149 (Sixth Cir., 1980) 15, 16

Burford v. *Sun Oil Company*, 319 U.S. 315 (1943) . . 18, 19

California v. *Grace Brethren Church*, 457 U.S. 393 102 S.Ct. 2498, 73 L.Ed.2d 93, 107, FN 22 (1982) 22

City of Ludington v. *Michigan Assoc. of Telephone Cos.*, 333 Mich. 79; 52 NW2d 605 (1952) 12

Daniels v. *Williams*, 474 U.S. ____; 106 S.Ct. 662; 88 L.Ed.2d. 662 (1986) 10

Davidson v. *Canon*, 474 U.S. ____; 106 S.Ct. ____; 88 L.Ed.2d. 677 (1986) 10

Fair Assessment in Real Estate Assoc. v. *McNary*, 454 U.S. 100, 102 S.Ct. 177; 70 L.Ed.2d. 271 (1981) 18, 20

General Telephone Co. v. *MPSC*, 341 Mich. 620; 67 NW2d 882 (1954) 13

Gregory v. *Mitchell*, 634 F.2d. 199 (Fifth Cir., 1981) 24

Griffin v. *Breckenridge*, 403 U.S. 88; 91 S.Ct. 1790; 29 L.Ed.2d. 338 (1971) 16, 17

Hannah Mining Co. v. *Minn. Power & Light Co.*, 573 F.Supp. 1395 (1983) 21

Hudson v. *Palmer*, ____ US ____; 82 L.Ed.2d. 393; 104 S.Ct. 3194 (1984) ..... 7, *passim*

In Re Northern Telephone Co., 35 P.U.R. 4th 306 ... 4

Mesick Telephone Co. v. *MPSC*, Ingham Docket 80-25146-AA 4

Michigan Consolidated Gas Co. v. *MPSC*, 389 Mich. 624; 209 NW2d 210 (1973) 13

Northern Telephone Co. v. *MPSC*, Ingham Circuit Docket 80-25001-AA 4

Parratt v. *Taylor*, 451 U.S. 527; 68 L.Ed.2d. 420; 101 S.Ct. 1908 (1981) ..... 7, *passim*

Ross v. *Consumers Power Co.*, 420 Mich. 567; 363 N.W.2d. 641 (1984) 9

Smith v. *Martin*, 542 F.2d. 688 (Sixth Cir., 1976), *cert. den.* 431 U.S. 905; 97 S.Ct. 1697; 52 L.Ed.2d. 388 (1977) 23

Stanislaus Food Products Co. v. *PUC*, 560 F.Supp. 114 (1982) 21

Tennyson v. *Gas Service Co.*, 506 F.2d. 1135 (Tenth Cir., 1974) 21, 22

United Brotherhood of Carpenters & Joiners v. *Scott*, 463 U.S. 825; 103 S.Ct. 3352; 77 L.Ed.2d. 1049 (1983) 17, 18

Vicory v. *Walton*, 721 F.2d. 1062 (Sixth Cir., 1983), *cert. den.* 105 S.Ct. 125 (1984) ..... 7, *passim*

STATUTES

1909 P.A. 144, M.C.L. 460.301 *et seq*; M.S.A. 22.101 *et seq* 12

1909 P.A. 300, M.C.L. 462.2 *et seq*; M.S.A. 22.21 *et seq* 12

1909 P.A. 300, M.C.L. 462.26, M.S.A. 22.45 .. 4, 12

1913 P.A. 206, M.C.L. 484.101 *et seq;* M.S.A. 22.1441 *et seq* 3, 12

1939 P.A. 3, M.C.L. 460.4 *et seq*; M.S.A. 22.13(4) *et seq* 12

1939 P.A. 3, M.C.L. 460.6, M.S.A. 22.13(6) .. 3, 12

1939 P.A. 3, 460.6a, M.S.A. 22.13 (6a) 4

1939 P.A. 3, M.C.L. 460.4, M.S.A. 22.13(4) ... 12

1969 P.A. 306, M.C.L. 24.201 *et seq*; M.S.A. 3.560(101) *et seq* 3, 14

1982 P.A. 162, § 922(1), M.C.L. 450.2922; M.S.A. 21.197(922) 5

28 U.S.C. § 1342 ..... 20, *passim*

28 U.S.C. § 1343(3) 3

42 U.S.C. § 1983 ..... 2, *passim*

42 U.S.C. § 1985(3) ..... 2, *passim*

RULES

Michigan Administrative Code, 1979 AC, R. 460.11 *et seq* 4, 14

Federal Rules of Civil Procedure, 12(b)(1) & 12(b)(6) 5

Michigan General Court Rule. GCR 1963, 711 .. 14

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GERALD IRWIN, former Director of the Communications Division of the Michigan Public Service Commission Staff,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

This brief is filed on behalf of Respondent Michigan Public Service Commission (MPSC) and the individually named respondents comprising former commissioners or MPSC Staff

in opposition to Petitioners National Communications Systems, Inc.'s (NCSI) and Victor E. Shapley's petition for writ of *certiorari* filed in this court, which seeks review of the April 25, 1986, United States Court of Appeals (Sixth Circuit) decision (Appendix A1-A8 to Petitioners' brief) which affirmed the January 28, 1985, United States District Court (E.D., Mich.) order (Appendix B1-B2 to Petitioners' brief) dismissing petitioners' May 4, 1984, complaint filed in the District Court (Appendix C1-C9 to Petitioners' brief).

The MPSC is a statutorily created commission in Michigan which regulates the rates, services, practices, and related aspects of utilities operating in Michigan, including telephone utilities. Respondents Schneidewind and Demlow are former Chairmen of the MPSC, Mr. Roger Fischer is the Chief of the MPSC Staff, and Mr. Gerald Irwin is the former Director of the MPSC Staff's Communications Division.

The Respondents' position in this matter is that the opinions and orders of the Sixth Circuit Court of Appeals and the United States District Court are correctly decided, and that the petition for writ of *certiorari* should be denied by this Honorable Court.

STATEMENT OF FACTS

On May 4, 1986, Petitioners filed their complaint in the United States District Court (E.D., Mich.) against Respondents MPSC, *et al*, pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983 and § 1985(3), seeking $5 million in damages for actions allegedly undertaken by Respondents in the processing of rate and securities cases before the MPSC, which actions allegedly resulted in loss of income and profits to NCSI, the subsequent forced sale of NCSI and the incurrence

by Petitioner Victor E. Shapley of personal guarantees undertaken by Mr. Shapley on behalf of NCSI, and claimed damage to the business reputation of Petitioner Shapley. The complaint claimed federal court jurisdiction under 28 U.S.C. § 1343(3), and violations of Petitioners' constitutional rights of equal protection and due process.

The allegations in Petitioners' complaint arise from claimed actions by the MPSC or its Staff in the processing of securities and rate increase applications filed by Northern Telephone Company (Northern) and Mesick Telephone Company (Mesick), two small telephone companies located in the northwestern lower peninsula of Michigan. NCSI, the parent holding company formed in 1975, owned the corporate stock (but not the plant or assets) of Northern and Mesick.

Northern and Mesick were fully subject during their corporate existence to the jurisdiction of the MPSC with respect to service standards, financial and accounting matters, security issuances, plant construction requirements, operations and rates. The MPSC's regulatory control over the telephone companies was exerted pursuant to state statute, including § 6 of 1939 P.A. 3, M.C.L. 460.6; M.S.A. 22.13(6), and the Michigan Telephone Act, 1913 P.A. 206, M.C.L. 484.101 *et seq*; M.S.A. 22.1441 *et seq*, among other provisions.

The securities case for Northern commenced on September 30, 1976, when the utility filed an application for approval to issue long-term securities in MPSC Docket F-876. The rate case commenced on February 2, 1977, when Northern filed an application in MPSC Docket U-5338 to increase its rates by $47,000. Both proceedings were conducted on a consolidated basis pursuant to the contested case provisions of the Michigan Administrative Procedures Act of 1969 (MAPA), 1969 P.A. 306, M.C.L. 24.201 *et seq*; M.S.A. 3.560(101) *et seq*, and in accordance with the Rules of Practice and Procedure Before the Michigan Public Service Commission, 1979

Administrative Code, R. 460.11 *et seq*, which provide for advance notice, discovery, hearings, the filing of briefs, issuance of a proposed decision by a presiding administrative law judge (ALJ), briefs of exception relative to the proposed decision, and a final MPSC order.

On June 19, 1978, the MPSC issued an order in rate case U-5338 granting Northern partial and immediate rate relief of $10,000 pending completion of the case, as permitted by § 6a of 1939 P.A. 3, M.C.L. 460.6a; M.S.A. 22.13(6a). Thereafter, following lengthy proceedings, which comprised approximately 44 hearing days and an evidentiary record of 4,196 transcript pages and 76 exhibits, and subsequent briefing and a proposed decision by the presiding ALJ, the MPSC issued its final order on April 1, 1980, authorizing Northern to issue securities to refund short-term borrowings utilized in the interim, and also a permanent rate increase of $25,669 (*In Re Northern Telephone Co.*, 35 P.U.R. 4th 306).

Northern appealed the MPSC's April 1, 1980, final order to the Ingham Circuit Court in accordance with the applicable appeal statute, § 26 of 1909 P.A. 300, M.C.L. 462.26; M.S.A. 22.45 (*Northern Telephone Co.* v. *MPSC*, Ingham Circuit Docket 80-25001-AA). Northern's appeal was later dismissed on September 9, 1981, pursuant to the stipulation of all parties, including Northern.

Mesick was also the subject of a rate and securities order issued on April 30, 1980, in MPSC Docket Nos. U-5470 and F-513. This case was also appealed to the Ingham Circuit Court (*Mesick Telephone Co.* v. *MPSC*, Ingham Docket 80-25146-AA) and was dismissed by a stipulation of the parties, including Mesick, on September 15, 1986.

On September 18, 1981, the parent holding company, NCSI, filed for Chapter 11 bankruptcy protection, with the existing management as debtor-in-possession. On April 11,

1983, NCSI entered Chapter 7 bankruptcy liquidation proceedings, with Ms. Susan Harris being appointed as NCSI trustee. On May 15, 1984, NCSI was automatically dissolved as a corporation pursuant to 1982 P.A. 162, § 922(1), M.C.L. 450.2922; M.S.A. 21.197(922), due to its failure to file annual reports and fees as required by state statute.

On May 4, 1984, as noted, Petitioners commenced this action in the District Court under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) seeking $5 million in damages based upon allegations concerning MPSC procedures and rate orders concerning Northern. On May 30, 1984, Respondents filed a motion to dismiss Petitioners' complaint, with brief and appendix in support thereof. Respondents' motion and supporting brief sought dismissal under Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6), for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. The specific grounds for dismissal asserted by Respondents included, but were not limited to, the following: 1) The court lacked jurisdiction over the subject matter of the complaint because the State of Michigan was the real party in interest, and the State did not waive its sovereign immunity under the Eleventh Amendment to the U.S. Constitution; 2) The complaint failed to state a claim of action or protected federal right under 42 U.S.C. § 1983 and/or 42 U.S.C. § 1985, and failed to allege the inadequacy of state procedures; and 3) Petitioners either had no standing or were not authorized to commence the suit against Respondents, in view of previous state court case stipulations and dismissals, and NCSI's liquidation proceedings in U.S. Bankruptcy Court.

On January 28, 1985, the District Court issued its order dismissing Petitioners' complaint. Thereafter, on February 22, 1985, Petitioners filed their notice of appeal to the Sixth Circuit Court of Appeals. In briefing before the appellate court, Respondents maintained their specific positions in support of

the District Court's dismissal order. On April 25, 1986, the Sixth Circuit Court of Appeals issued its opinion affirming the District Court's dismissal of all claims against Respondents. On or about July 23, 1986, Petitioners then filed their petition for writ of *certiorari*, dated July 21, 1986, in this court.

ARGUMENT

I

PETITIONERS' CLAIMS AGAINST THE MICHIGAN PUBLIC SERVICE COMMISSION, AND THE INDIVIDUAL RESPONDENTS IN THEIR OFFICIAL CAPACITIES, WAS PROPERLY DISMISSED PURSUANT TO THE ELEVENTH AMENDMENT.

The District Court and Sixth Circuit Court of Appeals properly dismissed Petitioners' claims against the MPSC and the individual defendants in their official capacities. The District Court order stated:

> "IT IS ORDERED that the claims against the Michigan Public Service Commission and the individual defendants in their official capacities is DISMISSED as required by the Eleventh Amendment."

The Court of Appeals decision also stated:

> "At oral argument plaintiffs' counsel admitted that the District Court properly dismissed the claims against the Michigan Public Service Commission and any claims against the commissioners in their official capacity. Plaintiffs do not appeal the District Court's order in this respect, and we therefore state no opinion on the Eleventh Amendment issue."

Petitioners before this court do not challenge these lower court rulings dismissing Petitioners' claims against the MPSC and the individual defendants in their official capacities pursuant to the Eleventh Amendment.

II

THE LOWER COURTS PROPERLY DISMISSED PETITIONERS' ACTION AGAINST THE MPSC COMMISSIONERS AND SENIOR STAFF IN THEIR INDIVIDUAL CAPACITIES PURSUANT TO PREVAILING CASE PRECEDENT.

The lower courts properly dismissed Petitioners' claims against the commissioners and senior MPSC Staff, insofar as they attempted to reach them in their individual capacities. The U.S. District Court's January 28, 1985, order stated:

> "For reasons stated on the record in open court, IT IS ORDERED that the due process claims against the individual defendants in their individual capacities are DISMISSED as required by *Parratt* v. *Taylor*, 451 U.S. 527 (1981); *Hudson* v. *Palmer*, ____ U.S. ____; 104 S.Ct. 3194 (1984), and *Lee* v. *Western Reserve Psychiatric Habilitation Center*, No. 83-3421 (6th Cir., 1984)."

The Court of Appeals properly affirmed the dismissal of the remainder of Petitioners' complaint based upon its application of this court's precedent in *Parratt* v. *Taylor*, 451 U.S. 527; 68 L.Ed.2d. 420; 101 S.Ct. 1908 (1981), and *Hudson* v. *Palmer*, ____ US ____; 82 L.Ed.2d. 393; 104 S.Ct. 3194 (1984), and the Sixth Circuit Court of Appeals decision in *Vicory* v. *Walton*, 721 F.2d. 1062 (Sixth Cir., 1983), *cert. den.* 105 S.Ct. 125 (1984), finding dismissal proper due to Petitioners' failure to

plead the inadequacy of state processes. The Court of Appeals stated in part:

> "Plaintiffs' appeal centers mainly around the District Court's dismissal of their individual-capacity § 1983 claim against the commissioners alleging the deprivation of a property interest without procedural due process. Plaintiffs do not allege a taking under the fifth amendment, a seizure of property under the fourth amendment, or any other claim incorporated by the fourteenth amendment's due process clause. This then is simply a § 1983 damage suit for deprivation of property without procedural due process. In *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 125 (1984), this Court dealt with another such suit and held:
>
> > in section 1983 damage suits for deprivation of property without procedural due process the plaintiff has the burden of pleading and proving the inadequacy of state processes, including the state damage remedies to redress the claimed wrong.
>
> 721 F2d at 1063. This requirement was imposed under the authority of *Parratt* v. *Taylor*, *supra*, and the Supreme Court applied a similar requirement a year after *Vicory* in *Hudson* v. *Palmer*, *supra*.
>
> "Plaintiffs failed to plead the inadequacy of state processes. . . ."
>
> Court of Appeals Opinion, April 25, 1986, Petitioners' Appendix A4.

The Court of Appeals went on to reject Petitioners' argument that this case is different from *Parratt*, thus absolving them of any requirement to show the inadequacy of state remedies, based upon their claims that this case involves conspiratorial acts by public officials whose duty it was to see that

Petitioners were not denied due process. The Court of Appeals correctly noted that the Petitioners advanced no applicable authority for this contention, and then referenced its ruling in *Vicory* to the effect that the principle in *Parratt* "does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct or is based on strict liability" and that "the reasoning of *Parratt* appears to extend at least to all § 1983 cases claiming a procedural due process injury to a property interest."

The Court of Appeals also rejected Petitioners' next argument to the effect that state law remedies are *per se* inadequate because state law clothes the commissioners and MPSC Staff in absolute immunity from liability in a suit for damages based on their official conduct. Referring to this court's opinion in *Hudson* v. *Palmer*, *supra*, and the Michigan Supreme Court's opinion in *Ross* v. *Consumers Power Co.*, 420 Mich. 567; 363 N.W.2d. 641 (1984), the Court of Appeals found that Petitioners' argument was without merit, since the individual defendants were not entitled to absolute immunity but were granted only qualified immunity, and were thus immune from tort liability under state law only if their acts giving rise to the potential liability were committed in good faith. Further, the Court of Appeals noted that state procedures are not inadequate under the rulings of this court (*Parratt* and *Hudson*, *supra*) merely because the state procedures might not afford relief identical to that sought in the civil rights action. (Court of Appeals Opinion, Petitioners' Appendix A6–A7.)

The Court of Appeals then correctly concluded that Petitioners had failed to allege the inadequacy of various available state procedures or remedies, as follows:

> "In short, Michigan law presents a variety of procedures to redress the wrongs that plaintiffs assert. Not only could plaintiffs have taken an appeal from the regulatory proceedings before the Public Service Commission, but they

> could have brought a state law action in tort or restitution, not to mention seeking one of the different extraordinary writs available to force the commissioners to cease intentionally acting outside their authority. Plaintiffs failed to show that these available procedures did not afford the process that is due under the fourteenth amendment."

Court of Appeals Opinion, Petitioners' Appendix A7

Petitioners now argue to this court that the principles of *Parratt*, *Hudson* and *Vicory* do not apply to the due process allegations in this case because the allegations indicate conduct which rise to the level of a "constitutional tort," or a form of "substantive" due process violation, due to state conduct which is "abhorrent," "shocks the conscience," or is "an abuse of governmental power." Petitioners claim that pursuant to such allegations a § 1983 action may be brought in federal court notwithstanding the availability of state tort remedies, citing this court's opinions in *Daniels* v. *Williams*, 474 U.S. ____; 106 S.Ct. 662; 88 L.Ed.2d. 662 (1986), and *Davidson* v. *Canon*, 474 U.S. ____; 106 S.Ct. ____; 88 L.Ed.2d 677 (1986).

Aside from the inapplicability of the above cases to the principle espoused by Petitioners, this case does not represent a situation in which a category of action based upon state government abuse of power should be created or applied as an exception to the principles of *Parratt* and *Hudson*, which cases hold that a § 1983 claim cannot be based on allegations of negligent conduct or intentional conduct. Clearly, there would appear to be no less reason for requiring a showing that state legal and equitable remedies were inadequate in situations where there may be an abuse of government power by an individual, then there is in a situation where there may be intentional or negligent conduct by an individual. This is true because the state courts, which review and sometimes supervise actions of state agencies, and which have some expertise with respect to such matters, should have the opportunity to

be apprised of the situation and to effect proper remedies. Further, it is a rather simple task for an artful or aggressive pleader to allege facts or conclusions suggesting an abuse of governmental power when in fact the claims may be largely or wholly baseless, or at least overstated. In fact, Petitioners' suggested basis for entertaining this § 1983 claim, despite the existence of fully adequate state remedies, based upon pleadings alleging the abuse of government power by an individual, would likely lead to more exaggerated pleading to avoid proper dismissal motions, and an artificial distinction between so-called intentional conduct and an abuse of government power.

Petitioners also assert that the *Parratt/Hudson* rule does not apply to conspiratorial conduct, as opposed to random and unauthorized acts of misconduct by government employees, where the wrongdoers are in a position to afford the victim of their conspiracy due process of law. Petitioners also repeat their claims that the individual defendants in this case were involved in a conspiracy for purposes of depriving the Petitioners of their right of equal protection and due process, contrary to 42 U.S.C. § 1985(3), and that the individual defendants were in a position, but for their conspiracy to act otherwise, to provide Petitioners a "predeprivation" hearing. However, Petitioners assert nothing new in this regard, and the Court of Appeals correctly observed that no authority is presented to indicate why an alleged conspiracy, which is easy to allege in pleadings, should serve to avoid the reasonable principles of *Parratt, Hudson* and *Vicory* to the effect that the state of mind or intent of the defendants is not determinative of whether a party may seek § 1983 remedies in federal court concerning procedural due process injury to a property interest, at least without undertaking clearly adequate state remedies or alleging the inadequacy thereof.

The Court of Appeals has correctly pointed out Petitioners' failure to allege the inadequacy of state procedures or remedies, or to pursue various legal and equitable remedies in the

state courts. In fact, the number of suitable state court remedies which were available to the Petitioners, and the accessibility of the state courts, totally belies Petitioners' factual or legal allegations in this case.

It may be noted in this regard that the MPSC was established by the state legislature in 1939 to accede to the regulatory powers over public utilities and railroads held by its predecessor bodies, the Michigan Public Utilities Commission, and before that, the Michigan Railroad Commission. 1939 P.A. 3, §§ 4 and 6, M.C.L. 460.4 *et seq*; M.S.A. 22.13(4) *et seq*. Pursuant to the 1939 Act, all of the statutes applicable to the predecessor commissions were thus made fully applicable to the MPSC. This included the MPSC's powers over telephone utilities pursuant to the Michigan Telephone Act, 1913 P.A. 206, M.C.L. 484.101 *et seq*; M.S.A. 22.1441 *et seq*, and also the Michigan Railroad Act, 1909 P.A. 300, M.C.L. 462.2 *et seq*; M.S.A. 22.21 *et seq*, including § 26 thereof, M.C.L. 462.26; M.S.A. 22.45, which is the applicable appeal statute providing judicial review relative to commission orders concerning rates, services, operations, and practices of public utilities. Section 26, as the general appeal statute applicable to commission orders, has been held to specifically apply to orders involving telephone rate matters. *City of Ludington* v. *Michigan Assoc. of Telephone Cos.*, 333 Mich. 79; 52 NW 2d 605 (1952). This appeal statute, attached to this brief as Addendum A, establishes the Ingham Circuit Court as the centralized statewide forum for obtaining both legal and equitable review of commission orders and actions. While Section 26 governs most appeals from commission orders or actions, review of Michigan securities orders is provided in the Court of Appeals, pursuant to the provisions of 1909 P.A. 144, M.C.L. 460.301 *et seq*; M.S.A. 22.101 *et seq*.

Pursuant to § 26, the Ingham Circuit Court is granted widespread powers of judicial review, including considerable

equitable powers, with respect to commission orders and actions. The appeal state also grants parties the right to present evidence in addition to that presented to the commission, and empowers the court to require by remand or otherwise that appropriate action be undertaken to correct an unlawful or unreasonable MPSC order or action.

Further, the Michigan courts have upheld the equitable powers of the Ingham Circuit Court to supervise the MPSC and to prevent harm to utilities, as indicated in *General Telephone Co.* v. *MPSC*, 341 Mich. 620; 67 NW 2d 882 (1954), wherein the Michigan Supreme Court held that it was evident that the legislature placed upon both the commission and the Ingham Circuit Court "a joint responsibility to see to it that telephone rates were just and reasonable." (341 Mich. 620, 631). In that case, the Michigan Supreme Court upheld the circuit court's power to issue an injunction to raise rates pending final completion of rate case litigation before the court and the MPSC. Further, in *Michigan Consolidated Gas Co* v. *MPSC*, 389 Mich. 624; 209 NW 2d 210 (1973), the Michigan Supreme Court again upheld the Ingham Circuit Court's power to issue an injunction to protect the utility from irreparable harm pending final action on rate litigation before the court and the MPSC. The Michigan Supreme Court stated:

> "The old saying, 'Justice delayed is justice denied,' applies with particular force to a rate hearing. Every day a warranted rate increase is withheld is a day in which justice has been denied unless judicial action, as in this case, can be taken."
>
> 389 Mich. 624, 637

The Ingham Circuit Court has also used the extraordinary writ of superintending control to require the Commission to receive certain evidence, and to consider it, in ongoing hearings before the Commission, even before the Commission had issued an order in the case. (Temporary order of superintending control of Ingham Circuit Court Judge Robert Holmes

Bell, dated September 30, 1983, in *Attorney General* v. *MPSC*, and *ABATE* v. *MPSC*, Ingham Circuit Court Dockets 83-50827-AA and 83-50829-AA.) The court undertook such action pursuant to its statutory and equitable powers, and pursuant to Michigan Court Rule provisions regarding superintending control, G.C.R. 1963, 711, which court rule was in full effect during all time periods covered by Petitioners' complaint (although the court rules were amended in 1984). The Ingham Circuit Court thus has always been available, on very short notice, to consider and hear claims regarding MPSC orders or actions, and to provide appropriate judicial review and, if necessary, equitable or supervisory relief.

Just as important, the MPSC rate procedures are mandated to follow the provisions of the Michigan Administrative Procedures Act, (MAPA), 1969 P.A. 306, M.C.L. 24.201 *et seq*; M.S.A. 3.560(101) *et seq*, including Chapter IV thereof, which provides extensive contested case hearing rights. Further, the provisions of MAPA and the Michigan court rules are applied in commission proceedings by the Rules of Practice and Procedure Before the Commission, 1979 Administrative Code, 460.11 *et seq*. Since the provisions of MAPA and the MPSC Rules of Practice and Procedure were fully utilized in this case, all parties, including Petitioners, were provided advance notice and the opportunity to participate in or receive prehearing discovery, prehearing conferences, formal hearings including direct examination and cross-examination, the submission of written briefs, the issuance of a proposed decision by the presiding ALJ, the filing of exception briefs to the ALJ's proposal for decision (PFD), and a formal MPSC decision. The full use of these procedures belies Petitioners' claims that they were not provided with "predeprivation" due process in this case.

Thus, not only would Petitioners have the right to pursue legal remedies, pursuant to general tort law or other applicable statutes, comprising a "post deprivation" remedy, it is

even more clear that Petitioners have always had full and accessible remedies in the state courts to prevent, address, or remedy any possible wrongdoing which would have affected the rate case procedures or other actions undertaken before the MPSC. In other words, Petitioners had a "contemporaneous" or "predeprivation" remedy in the state courts to insure that they were not harmed by any actions of the MPSC or its officers or employees. Again, Petitioners' failure to utilize these readily available remedies belie their claims in this matter.

In summary, Petitioners' theory; namely, that numerous available and accessible state court remedies can be purposely avoided, and that years later a federal court suit seeking review of alleged MPSC actions can be launched pursuant to § 1983 or § 1985(3), based simply upon artful and exaggerated pleadings concerning an "abuse of government power" or a "conspiracy," and without even alleging or showing the inadequacy of state procedures, should be rejected by this court.

III

THE LOWER COURTS PROPERLY DISMISSED PETITIONERS' EQUAL PROTECTION CLAIM BROUGHT UNDER § 1985(3).

The Court of Appeals properly affirmed the dismissal of Petitioners' equal protection claim brought under § 1985(3); namely, the allegations that Petitioners were denied equal protection by Respondents' intentional discrimination against small telephone companies. The Court of Appeals cited its holdings in *Browder* v. *Tipton*, 630 F.2d. 1149 (Sixth Cir., 1980), that the "equal protection of the laws" language of § 1985(3) protected only the "so-called discrete and insular

minorities that receive special protection under the equal protection clause because of inherently personal characteristics." The Court of Appeals then concluded as follows:

> "Small telephone companies are not members of a discrete and insular minority of the sort that has traditionally received special protection under the suspect classification analysis of the fourteenth amendment. We therefore conclude that plaintiffs' § 1985(3) claims do not state a claim upon which relief can be granted." (fn. omitted)
>
> Court of Appeals decision, Petitioners' Appendix A8

Clearly, § 1985(3) requires Petitioners to demonstrate that they are members of an identifiable class and that they have suffered a deprivation of constitutional rights; namely, equal protection rights, as a result of their membership in the class. In *Browder* v. *Tipton*, *supra*, the Sixth Circuit also emphasized that the class to which the plaintiffs were members must be a "protected" class within the meaning of the equal protection cases, and that class-based discrimination be shown by a member of the class due to the exercise of a fundamental right, such as the exercise of political or religious rights.

In this case, the Court of Appeals correctly noted that Petitioners' complaint totally failed to meet the requirements for maintaining an action under § 1985(3). Petitioners' complaint failed to suggest any facts to define an identifiable class known as small Michigan telephone companies, nor to suggest unequal treatment of such a class. Nor does the complaint detail facts suggesting that such a class is protected, or that the exercise of a fundamental right is involved.

It is also clear that Petitioners' complaint fails to state a claim under § 1985(3) based upon the criteria or elements for such a cause of action as enumerated by this court in *Griffin* v. *Breckenridge*, 403 U.S. 88; 91 S.Ct. 1790; 29 L.Ed.2d. 338 (1971). In that case, this court, when interpreting the threshold requirement that a petitioner must allege a conspiracy for

the purposes of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws (403 U.S. 88, 102-103), stated:

> "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action."
>
> (Emphasis in original)

While this court in *Griffin* specifically reserved the question of "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" (403 U.S. 88, 102, fn. 9) under § 1985(3), the court did clarify in *United Brotherhood of Carpenters & Joiners* v. *Scott*, 463 U.S. 825; 103 S.Ct. 3352; 77 L.Ed.2d. 1049 (1983), that a conspiracy motivated by discrimination on the basis of economic views, status, or activities would not be actionable under § 1985(3), as follows:

> "...we find no convincing support in the legislative history for the proposition that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities. Such a construction would extend § 1985(3) into the economic life of the country in a way that we doubt that the 1871 Congress would have intended when it passed the provision in 1871."
>
> * * *
>
> "We thus cannot construe § 1985(3) to reach conspiracies motivated by economic or commercial animus."
>
> *Id*, 463 U.S. 825, 837-838 (Emphasis in original)

Thus, besides the Court of Appeals holding in this case, it is also clear that the precedent in *Scott* would indicate that Petitioners' vague claims regarding Respondents' discriminatory

approach to "small telephone companies" explicitly involves a claim relating to an economic class, status, or activity and that the holding of *Scott* bars such a claim under 42 U.S.C. § 1985(3).

IV

THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' COMPLAINT PURSUANT TO THIS COURT'S PRECEDENTS CONCERNING ABSTENTION AND COMITY.

The District Court below, as an additional basis for dismissal of Petitioners' complaint, found that the case should be dismissed based upon the principles of abstention and comity. Specifically, the District Court order stated:

> "For reasons stated on the record in open court, IT IS ORDERED that all remaining claims are DISMISSED as required by *Burford* v. *Sun Oil Company*, 319 U.S. 315 (1943), and *Fair Assessment in Real Estate Association* v. *McNary*, 454 U.S. 100 (1981)."
>
> Petitioners' Appendix B-2

The District Court's holding applying the principles of abstention and comity, as indicated in the cited cases, was appropriate. In *Burford* v. *Sun Oil Company*, 319 U.S. 315 (1943), this court dismissed plaintiff's challenge of an order of the Texas Railroad Commission regulating oil extraction from a Texas pool, premised on the claim that the order denied plaintiff due process rights. This court found abstention proper given the strong countervailing interest of the State of Texas in its complex regulatory system governing the oil industry and on the basis that the regulatory system was designed to answer important concerns of a local nature. Further, the court found that Texas employed a system of judicial review

whereby decisions of the regulatory agency could be appealed to a single forum (i.e., a single circuit court having special expertise in the subject matter).

Like the situation in *Burford*, *supra*, Petitioners' claims invite this court to interfere in the ratemaking procedures and process of the Michigan Public Service Commission, which regulates all gas, electric, and telephone utilities in the State of Michigan, among other industries. Further, it is clear that Petitioners' allegations arise from various issues in an MPSC rate case, including issues concerning the calculation of rate base, findings made on field and accounting audits, among other issues. These ratemaking issues are not only complex, but also involve an area; namely, public utility regulation, wherein the states have particularly strong, legitimate interests pursuant to their respective police powers.

Further, like *Burford*, *supra,* it is clear that Michigan has a centralized administrative body to handle utility ratemaking matters; namely, the MPSC, and centralized judicial review in a single forum having special expertise in reviewing MPSC orders and actions; namely, the Ingham Circuit Court, with appeal thereafter, to the Michigan Court of Appeals and the Michigan Supreme Court. (Further, it is noted that appeals of utility matters from the Ingham Circuit Court to the Michigan Court of Appeals are by *right*, not by leave, as clarified in *Attorney General* v. *MPSC*, 392 Mich. 660; 221 NW 2d 299 (1974)). Thus, like *Burford*, federal involvement, as opposed to deference to adequate state procedures and remedies, would be disruptive to the state's policies in ensuring that fair and effective utility regulation is undertaken in Michigan. Also, all issues concerning rates are a matter of strong local concern, and can be readily handled in the state forum. Further, the state forum is fully adequate to review both state and federal constitutional and statutory issues, particularly since state and federal constitutional claims are often made by utilities in rate case appeals (such as claims that the rates are unreasonable low and thus confiscatory under due process).

The same factors as noted above, and by the court in *Fair Assessment in Real Estate Assoc.* v. *McNary*, 454 U.S. 100, 102 S.Ct. 177; 70 L.Ed.2d. 271 (1981), should be a basis for this court to find that Petitioners' case should be dismissed on the basis of comity, since dismissal would balance the proper roles of federal and state courts with respect to review of state administrative orders involving utility ratemaking, and would serve the interests of judicial administration on both the state and federal levels, without adversely affecting access to a fair judicial forum.

V

FEDERAL COURT JURISIDICTION OVER THIS RATE CASE LITIGATION IS INCONSISTENT WITH THE JOHNSON ACT, 28 U.S.C. 1342.

Before the Court of Appeals, Respondents also urged in brief that Petitioners' complaint in this case constituted an attempt to obtain federal court review of MPSC proceedings and agency orders in a rate case involving numerous complex legal and factual issues, even though Petitioners never utilized any opportunities for seeking review of the MPSC orders or actions before the state courts. This situation is contrary to the spirit, if not the language of the Johnson Act, 28 U.S.C. § 1342, which prohibits federal court jurisdiction in state ratemaking matters as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State."

Cases arising under the Johnson Act, *supra*, have recognized Congress' broad intention to keep state ratemaking matters out of the federal courts, following a frustrating period in American history in which innumerable state ratemaking matters were being petitioned to the federal courts by utilities claiming violation of federal constitutional rights. In *Hannah Mining Co.* v. *Minn. Power & Light Co.*, 573 F.Supp. 1395 (1983), the court stated:

"The act was passed after years of hostility generated by federal encroachment upon the traditional ratemaking powers of the states. Strong policy reasons, then, dictate a broad reading of the act to keep federal interference to a minimum."

573 F.Supp. 1395, 1400

Similarly, in *Stanislaus Food Products Co.* v. *PUC*, 560 F.Supp. 114 (1982), the court stated:

". . .[B]y its broad wording it is clear that it [the Johnson Act] was intended to keep constitutional challenges to orders affecting rates out of the federal courts 'lock, stock and barrel' *Tennyson* v. *Gas Service Co.*, 506 F.2d 1135, 1138 (10th Cir, 1974). As Professor Moore explained, the Act prompts a 'general hands-off policy relative to state rate making'."

560 F.Supp. 114, 118

The court in *Tennyson* v. *Gas Service Co.*, 506 F.2d. 1135 (Tenth Cir., 1974), stated:

> "We thus consider again the problem of federal intervention in state rate matters. The problem has had a long and troublesome history. The evil sought to be remedied by the Johnson Act was the federal courts' interference with the states' own control of their public utility rates."
>
> 506 F.2d 1135, 1137

In all of the above cases, the federal courts found that the purposes of the Johnson Act were to be upheld by denying federal court review of the state ratemaking matters. Further, in *Tennyson*, *supra*, the court held that the prohibition against federal involvement in utility ratemaking went beyond the specific terms of the Act concerning injunctive relief to bar actions for declaratory and monetary relief as well, in view of the far-reaching purposes of the Johnson Act. 506 F.2d. 1135, 1138. Consistent with this broad interpretation, see also this court's extensive footnote regarding the Johnson Act in *California* v. *Grace Brethren Church*, 457 U.S. 393; 102 S.Ct. 2498; 73 L.Ed.2d. 93, 107, FN 22, (1982).

It is thus clear that the Johnson Act establishes a congressional policy barring interference in state ratemaking matters by the federal courts, which policy should not be under-cut by permitting parties to state utility regulatory proceedings to obtain federal court review of the proceedings under the Civil Rights Act, and in circumstances where the party has never sought state court review or remedies. At the very least, if not barring such federal court review, the Johnson Act strongly supports the District Court's abstention of jurisdiction in this matter.

VI

PETITIONER SHAPLEY, AS ONE OF THE STOCKHOLDERS IN NCSI, HAS NO STANDING TO REPRESENT NCSI IN ITS CIVIL RIGHTS ACT CLAIMS, NOR DOES NCSI AS A FORMER STOCKHOLDER OF NORTHERN HAVE STANDING TO ASSERT SUCH RIGHTS ON BEHALF OF NORTHERN.

Before the Court of Appeals, Respondents urged that neither Petitioner Shapley nor Petitioner NCSI had standing to maintain their claims in this case, based upon several grounds including the existence of previous stipulations by Northern and Mesick dismissing court case appeals of contested commission orders, among other case settlements. In addition, Respondents urged that NCSI was in bankruptcy proceedings and was the subject of a Chapter 7 liquidation proceeding, and that no allegations existed to suggest that Petitioner Shapley, as one of the former shareholders of NCSI, had standing to represent NCSI's position in this litigation, despite the existence of a separately appointed trustee in bankruptcy and the subsequent dissolution of the corporation under state law.

Respondents also focused particular attention upon the established principle that a shareholder is precluded from maintaining an action under the Civil Rights Act for damages allegedly suffered by a corporation in which he owns shares. This fundamental rule was discussed in *Smith* v. *Martin*, 542 F.2d. 688, 690 (Sixth Cir., 1976), *cert. den.* 431 U.S. 905; 97 S.Ct. 1697; 52 L.Ed.2d. 388 (1977), wherein the court stated in part:

> "The district court was correct in its holding that *a stockholder cannot maintain an action under the Civil Rights Act for damages suffered by a corporation in which he owns shares.*

Erlich v. *Glasner*, 418 F.2d. 226 (9th Cir, 1969). Although appellant is correct in his contention that the court did not consider his claim of a conspiracy to injure him as an individual, we nevertheless hold that the action was properly dismissed."

Similarly, the Fifth Circuit has adopted the same rule in circumstances somewhat similar to the instant case, finding that stockholders of a bank were not the proper parties to press civil rights claims on behalf of the bank, nor was the bank itself, since it had been taken over by state authorities pursuant to state law. *Gregory* v. *Mitchell*, 634 F.2d. 199 (Fifth Cir., 1981). The court in *Gregory* v. *Mitchell*, *supra*, stated in relevant part:

"The district court was correct in holding that 'neither officers nor stockholders. . .can maintain an action to redress an injury to the corporation even though the value of their stock is impaired as a result of the injury.' This rule is firmly established, *Schaffer* v. *Universal Rundle Corporation*, 397 F.2d. 893 (5th Cir, 1968)(involving an action for breach of contract and violations of the Sherman Anti-Trust Act and Robinson-Patman Price Discrimination Act), and has been extended to Civil Rights actions brought under §1983 by shareholders claiming injury to the corporation. . . .

* * *

"After stating the controlling rule, the district court held:

> Since only the bank has allegedly suffered any injury in this case, all of the individual plaintiffs must be dismissed. Moreover, the bank should also be dismissed since, as plaintiffs conceded in their brief filed March 30, 1978, '[a]ny action to be maintained on behalf of the Bank is properly to be brought by the State Superintendent or the FDIC.'

> "These holdings, that the Civil Rights action by all individual stockholders must be dismissed and that the First Bank of Macon is an improper party-plaintiff, are eminently correct."
>
> 634 F.2d. 199, 202

Based on the above, it is clear that Petitioner Shapley has no standing as a stockholder to represent NCSI in this action. Further, neither would NCSI, as a stockholder of Northern, have standing in this case to represent Northern, the principal subject of the claimed wrongs. Just as important, NCSI is (or was up to its dissolution) under the total control and authority of the U.S. Bankruptcy Trustee, and not Petitioner Shapley. Thus, Petitioner Shapely cannot represent NCSI as a petitioner in this civil rights action, and NCSI is clearly properly dismissed from this litigation. Of course, while the lower court did not address these standing arguments, their validity further supports the dismissal of this action by the lower courts.

CONCLUSION AND RELIEF

For the reasons stated, the Sixth Circuit Court of Appeals decision affirming the District Court's dismissal of Petitioners' complaint against Respondents should be upheld, and Respondents therefore urge this Honorable Court to deny the petition for writ of *certiorari* filed in this matter.

Respectfully submitted,

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ADDENDUM

§22.45 Action to vacate order of commission; pleadings, hearing, decree. SEC. 26. (a) Any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within 30 days from the issuance of such order and notice thereof commence an action in the circuit court in chancery for the county of Ingham, against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed are unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable; in which suit the commission shall be served with a subpoena and a copy of the complaint. The commission shall file its answer, and on leave of court any interested part may file an answer to said complaint. Upon the filing of the answer of the commission said action shall be at issue and stand ready for hearing upon 10 days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the said circuit court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and the said circuit court in chancery is hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the court shall decide to be in accordance with the facts and the law;

Injunction. (b) No injunction shall issue suspending or staying any order of the commission, except upon application to the said circuit court in chancery or to the judge thereof,

notice to the commission having been given and hearing having been had thereon;

Additional evidence; judgment. (c) If, upon the trial of said action, evidence shall be introduced ◆ which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto, the court, before proceeding to render judgment, unless the parties in such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for 15 days from the date of such transmission. Upon receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice or service complained of in said action, and shall report its action thereon to said court within 10 days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order;

Appeal to supreme court. (d) Either party to said action, within 60 days after service of a copy of the order or judgment of the court, may appeal to the supreme court, which appeal shall be governed by the statutes governing chancery appeals. When the appeal is taken the case shall, on the return of the papers to the supreme court, be immediately placed on the calendar of the then pending term, and shall be brought to a hearing in the same manner as other cases on the calendar, or if no term is then pending, shall take precedence of cases of a

different nature except criminal cases at the next term of the supreme court;

Burden of proof. (e) In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be. (MCL § 462.26; CL '29 § 11042; CL '15, § 8134.)